Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-599

VIRGIL R. RIZZO, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PEITION FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

VIRGIL R. RIZZO
pro se
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SUPREME COURT OF THE UNITED STATES

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No._____

VIRGIL R. RIZZO, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 7, 1979, petition for rehearing denied on July 18, 1979.

OPINION BELOW

There was no opinion rendered in the Court of Appeals. However, there is an order by that Court dated May 7, 1979 granting Respondent's motion to dismiss Petitioner's appeals for want of jurisdiction.

The appeals were of decisions of the Tax Court denying the Petitioner's Motions for More Definite Statement and of decisions denying Petitioner's Motions to Vacate or Revise Decision. There was no opinion rendered in the Tax Court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on May 7, 1979, petition for rehearing was denied on July 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1) and 26 U.S.C. 7482 (a).

QUESTIONS PRESENTED

1. Did the Court below err in holding that the Petitioner's appeals be dismissed for want of jurisdiction when the accepted course of judicial proceedings pursuant to 26 U.S.C. 7482 (a), 28 U.S.C. 1292, and

Title I and Title III of the Federal Rules of Appellate Procedure properly confers jurisdiction in that Court?

2. Did the Court below err in dismissing Petitioner's appeals without first assuming jurisdiction to determine the issue of appealability?

3. Did the Court below err in dismissing Petitioner's appeals for want of jurisdiction when such dismissal is in conflict with applicable decisions of this Court?

4. Was the Petitioner denied due process of law, as guaranteed by the Fifth Amendment, when his appeals were dismissed without full and fair review?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

"No person shall....be deprived of life, liberty or property, without due process of law...."

STATUTE INVOLVED

The statutes involved are 26 U.S.C.

7482 (a) and by reference 28 U.S.C. 1292.

United States Code, title 26:

Section 7482. Courts of review.

(a) Jurisdiction

The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari in the manner provided in section 1254 of Title 28 of the United States Code.

STATEMENT OF THE CASE

This petition arises out of the dismissal for want of jurisdiction of Petitioner's appeals in the Third Circuit Court of Appeals. The Third Circuit without opinion dismissed Petitioner's appeal from an order of the United States Tax Court denying Petitioner's Motions for More Definite Statement and Motion to Vacate or Revise Decision.

The Petitioner had filed Petitions for Redetermination of assessed tax deficiencies which were excessive, arbitrary, oppressive and capricious, one deficiency of which had alleged fraud. During the pretrial proceedings Petitioner moved for more definite statement and filed a statement in lieu of attendance as provided for under Rule 50 (c) of the Tax Court rules. Petitioner's Statement was not reviewed by the Tax Court when it denied this motion. Decisions on these motions were critical to determine the burden of proof, due process, and procedural safeguards. The Court's decision countenanced probable abuse of process and improper and illegal procedure on the part of the Internal Revenue Service.

This case actually began as a tax audit of Petitioner Doctor Rizzo and his professional association, a general medical practice. The Internal Revenue Service during their investigation contacted the Doctor's patients in a defamatory manner and alleged improprities. The Doctor then resisted and subsequently was found in contempt, jailed, and fined. On appeal the Fifth Circuit reversed. United States v. Rizzo, 539 F.2d 458 (5th Cir. 1976).

Facing the Statute of Limitations the Commissioner of Internal Revenue arbitrarily assessed tax deficiencies against the Doctor and his Professional Association. The Commissioner based each arbitrary and excessive deficiency on the other, a circulus viciosus (arguing in a circle). Because of this excessiveness the Petitioner was then forced to file for redetermination in Tax Court. During the pretrial proceedings the Petitioner moved for more definite statement. Because the deficiencies were without factual basis or rational foundation and made without a proper or accepted method of determination, the Petitioner's motion was manditory. Without this clarification the Petitioner is befallen with prejudice, burdened with undue labor, time and expense, unable properly to prepare for trial, and subject to surprise, delay and injustice. His motion, however, was improvidently denied.

Petitioner filed a timely notice of appeal on December 2, 1978. A motion to consolidate both appeals was granted on April 24, 1979. On March 14, 1979 the Commissioner-Respondent filed a Motion to Dismiss Appeals and Petitioner filed an objection thereto. Petitioner's memo-

randum filed with his objection supported the procedural issues of jurisdictional review of the Appellate Court. Because of the complexity Petitioner filed a Supplemental Memorandum opposing the Commissioner's Motion to Dismiss. This Memorandum elaborated on the merits supporting the appealed issues. The Appellate Court refused to accept Petitioner's Supplemental Memorandum and on May 7, 1979 dismissed the appeals for want of jurisdiction excluding Petitioner from having his day in court.

On June 25, 1979, upon motion, the Third Circuit Court of Appeals granted permission for Petitioner to file a petition for rehearing out of time but denied his request for an opinion upon what grounds the Court granted Appellee's motion to dismiss appeals. Petitioner was not permitted to know why his appeals were not accepted. The Petition for Rehearing was denied on July 18, 1979. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I.

In holding that the Petitioner's appeals be dismissed for want of jurisdiction, the United States Court of Appeals for the Third Circuit rendered a decision that has so far departed from the accepted course of judicial proceedings that this Court must grant certiorari to exercise its power of supervision.

Important federal jurisdictional and procedural issue are involved in the denial of the Petitioner's appeals by the Third Circuit. Pursuant to 26 U.S.C. 7482 (a), 28 U.S.C. 1292, Title I and Title III of the Federal Rules of Appellate Procedure, the United States Court of Appeals for the Third Circuit has jurisdiction to hear Petitioner's appeals. On the contrary, the Third Circuit improperly dismissed Petitioner's appeals for want of jurisdiction.

Section 7482 (a) of the Internal Revenue Code of 1954 granting jurisdiction in the Appellate Court reads in pertinent part, "(a) Jurisdiction-The United States Court of Appeals should have exclusive jurisdiction to review the decisions of the Tax Court." The dismissal of Petitioner's appeals by the Third

Circuit is in direct conflict with this statute and its construction as intended by Congress.

Title I and Title III of the Federal Rules of Appellate Procedure also grant jurisdiction in the Court of Appeals. Title I reads in pertinent part "These rules govern procedure in appeals to United States district courts and the Tax Court of the United States....These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law." Title I and Title III rules have been followed by the Petitioner; however, in direct conflict with these rules the Third Circuit dismissed Petitioner's appeals for want of jurisdiction improperly limiting its jurisdiction as established by law. This Court should grant certiorari to exercise its supervision and direction.

Section 1292 of 28 U.S.C. also confers appellate jurisdiction in the Court of Appeals if the criteria under that Section are met. These criteria contended by the Petitioner to have been present were not evaluated by the Third Circuit when it dismissed Petitioner's appeals, thus improperly limiting its

jurisdiction.

The dismissal of Petitioner's appeals by the Court of Appeals without evaluation is inconsistent in theory and practice in that it directly contradicts the intent and meaning of the statutes and the Federal Rules of Appellate Procedure. Therefore, this Court in the exercise of its supervisory powers over the federal judiciary should grant certiorari to settle these questions in the administration of justice.

II.

In dismissing the Petitioner's appeals for want of jurisdiction without determining the issue of appealability, the United States Court of Appeals for the Third Circuit rendered a decision in conflict with the decision of other Courts of Appeal.

The Third Circuit Court of Appeals dismissed Petitioner's appeals without assuming jurisdiction to determine the issue of appealability in conflict with the decisions of other Courts of Appeal. This procedure of the Third Circuit is directly in conflict with the decision of the Court of Appeals for the Sixth Circuit

in Louisville Builders Supply Co. v. Commissioner, 294 F.2d 333 (6th Cir. 1961), the Court of Appeals for the Seventh Circuit in Ryan v. Commissioner 517 F.2d 13 (7th Cir.) cert. denied, 423 U.S. 892 (1975), the Court of Appeals for the Ninth Circuit in May v. Commissioner, 553 F.2d 1207 (9th Cir. 1977) and the Court of Appeals for the Second Circuit in Falik v. United States, 343 F.2d 38 (2nd Cir. 1965).

In these cases the Court of Appeals assumed jurisdiction of appealed pretrial orders entered in tax litigation to determine appealability in contrast to the approach taken by the Third Circuit in the instant case where the appeal was simply dismissed for want of jurisdiction without determining the proposed appealable issues. The Third Circuit dismissed the Petitioner's appeals of pretrial Tax Court orders without opinion despite allegations that the "collateral order doctrine" of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) applied and despite representations that Petitioner's rights under the Constitution and the Statutes had been violated.

This decision of the Third Circuit

is in direct conflict with the holding of the Court of Appeals for the Second Circuit in Falik v. United States, supra. In that case the Court not only assumed jurisdiction to determine the appealability of a pretrial motion involving tax litigation but also maintained jurisdiction to render a decisive opinion on that appeal. The procedure and decision of the Court of Appeals for the Second Circuit in Falik and the action of the Court of Appeals for the Third Circuit in the instant case set forth critically different procedures. This Court should grant certiorari to resolve this difference.

In refusing to assume jurisdiction of the Petitioner's appeals the Third Circuit has also acted in direct conflict with the holding of the Court of Appeals for the Sixth Circuit in Louisville Builders Supply Co. v. Commissioner, supra. In that case the Appellate Court assumed jurisdiction of an appeal of a pretrial Tax Court order regarding a deposition. Not only did the Court assume jurisdiction and reverse the Tax Court but also in its concise opinion it struck down allegations that appellate courts do not have jurisdiction over interlocutory Tax Court appeals.

The opinion and decision of the Court of Appeals for the Sixth Circuit in Louisville Builders and the action of the Court of Appeals for the Third Circuit in the case at bar set forth contradictory standards. The standards and procedure of the Third Circuit in failing to review appeals of pretrial Tax Court decisions are in direct conflict with those of other Courts of appeals and this Court should grant certiorari to resolve these conflicts.

III.

In holding that the Petitioner's appeals be dismissed for want of jurisdiction, the United States Court of Appeals rendered a decision in conflict with that entered by the Supreme Court of the United States.

The Court of Appeals for the Third Circuit has said in Commissioner v. Frieder and Sons Co., 228 F.2d 478 (3rd Cir. 1955), that an appealable decision of the Tax Court within the meaning of Section 7482 (a) of the Internal Revenue Code of 1954 is one dismissing the proceeding or one formally determining a deficiency or lack of a deficiency. If the Third Circuit applied this criteria to dismiss

Petitioner's appeals, their decision is in conflict with the decision of the United States Supreme Court in United States v. California Eastern Line, 348 U.S. 351 (1955). There this Court at 353 said:

> The language of §§ 1141 (Section 7482 (a) of the Internal Revenue Code of 1954) is broad enough to justify review of Tax Court renegotiation orders and we cannot say that because the section was originally passed primarily to authorize review of decisions on revenue matters it should be held inapplicable to decisions on other justiciable matters entrusted to Tax Court by Congress.

Clearly Tax Court renegotiation orders are neither orders "(1) dismissing the proceeding pending before it, whether for lack of jurisdiction or otherwise, or (2) formally determining a deficiency." These two criteria set forth in Commissioner v. Frieder and Son Co., supra, are then in conflict with the decision of the United States Supreme Court. Accord Louisville Builders Supply Co. v. Commissioner, supra. Therefore, the narrow interpretation of the word "decision" to exclude Petitioner's appeals is improper and contrary to the words of the Supreme Court and Congress.

Certiorari should be granted because the decision of the Court of Appeals for the Third Circuit on the question of jurisdiction of Tax Court appeals is in conflict with applicable decisions of this Court.

IV.

This Court should grant certiorari to settle the question of whether the denial of Petitioner's appeals by the Third Circuit without full review constitutes a violation of due process of law as granted by the Fifth Amendment.

The Court of Appeals for the Third Circuit failing to review the full facts behind Petitioner's appeals dismissed it for want of jurisdiction. In so holding it excluded Petitioner's appeal rights and denied him due process under the Fifth Amendment.

The Petitioner, in opposition to the Commissioner's motion to dismiss appeals, filed a memorandum supporting the procedural issues of jurisdictional review of the Appellate Court and a supplemental memorandum elaborating on the merits supporting the appealed issues. The supplemental memorandum was not reviewed

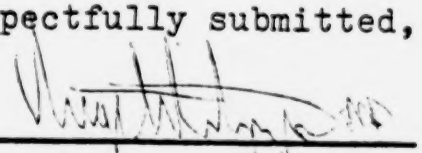
by the Court as it was not filed under its direction. By failing to evaluate Petitioner's supplemental memorandum and by subsequently dismissing his appeal, the Appellate Court then denied full review of Petitioner's presentation and deprived him of his right to appeal. This right to appeal cannot so be the subject of invidious discrimination depriving Petitioner of due process. Douglas v. California, 372 U.S. 353 (1963).

The Court of Appeals also failed to assume jurisdiction to determine if Petitioner's allegation that the decisions appealed are of such a nature that if appellate review were postponed immediate prejudice or irreparable injury would result. The applicability of this "collateral-order doctrine" as espoused by Mr. Justice Jackson in Cohen V. Beneficial Industrial Loan Corp., supra, must be evaluated before the Appellate Court could dismiss the appeal; otherwise Petitioner would be deprived of a full review and subsequently due process. This Court should grant certiorari to resolve these important questions of procedural due process in which Petitioner's appeals were dismissed without full review.

CONCLUSION

For the reasons aforesaid it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



VIRGIL R. RIZZO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

April 30, 1979

No. 79-1199/1200

VIRGIL R. RIZZO,
Appellant
vs.
COMMISSIONER OF INTERNAL REVENUE

(Tax Court Docket No. 4701-78)

VIRGIL RIZZO
vs.
COMMISSIONER OF INTERNAL REVENUE
Virgil R. Rizzo, Appellant

(T. C. Docket No. 4703-78)

Present: ADAMS, GIBBONS and WEIS, Circuit Judges.

1. Appellee's motion to dismiss appeals for want of jurisdiction, with Memorandum in support of motion,

2. Appellant's objection to appellee's motion to dismiss appeals, with Memorandum in support of motion,

3. Appellant's supplemental memorandum in support of appellant's objection to appellee's motion to dismiss appeals, (Not filed unless Court directs)

in the above listed for Monday, April 30, 1979, or as the Court decides.

Respectfully,

Clerk

enc.
FH:alf

The foregoing Motion is/are granted.

By the Court,

Judge

Dated: May 7, 1979

United States Court of Appeals

FOR THE THIRD CIRCUIT

No's. 79-1199/1200

VIRGIL R. RIZZO,
Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

SUR PETITION FOR REHEARING
BEFORE THE ORIGINAL PANEL

Present: ADAMS, GIBBONS and WEIS, Circuit Judges.

The petition for rehearing filed by Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court.

Circuit Judge

Dated: July 18, 1979

Supreme Court, U. S.
FILED
NOV 29 1979

No. 79-599

In the Supreme Court of the United States

OCTOBER TERM, 1979

VIRGIL R. RIZZO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-599

VIRGIL R. RIZZO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner appealed from two orders of a United States Tax Court Special Trial Judge which denied his pretrial motion for a more definite statement in the pleadings and his motion to revise the first order. Petitioner now seeks review in this Court of the court of appeals' dismissal of the appeal for lack of jurisdiction.

1. The court of appeals correctly dismissed petitioner's appeal. Appellate jurisdiction over adjudications of the United States Tax Court is conferred on the courts of appeals by Section 7482(a) of the Internal Revenue Code of 1954 (26 U.S.C.). It is well settled, however, that only final "decisions" of the Tax Court are appealable under that provision. *Ryan* v. *Commissioner*, 517 F. 2d 13, 16 (7th Cir.), cert. denied, 423 U.S. 892 (1975); *Porter* v. *Commissioner*, 453 F. 2d 1231 (5th Cir. 1972); *Licavoli* v.

Commissioner, 318 F. 2d 281 (6th Cir. 1963); *Commissioner* v. *Smith Paper*, 222 F. 2d 126 (1st Cir. 1955). In the context of proceedings to redetermine deficiencies of income tax, a "decision" of the Tax Court is one which determines the amount of a deficiency, dismisses a petition, or otherwise ends the litigation between the parties. *Ryan* v. *Commissioner*, *supra*, 517 F. 2d at 16; *Porter* v. *Commissioner*, *supra*; *Commissioner* v. *S. Frieder & Sons Co.*, 228 F. 2d 478 (3d Cir. 1955).

These cases have not been tried by the Tax Court, and thus no final decision has been reached. Since the Tax Court's orders denying the pretrial motions neither redetermined the deficiencies asserted nor dismissed the proceedings before it, those orders did not constitute "decisions" within the meaning of Section 7482(a).

Contrary to petitioner's assertions (Pet. 8-10, 15-16), there is no statute granting jurisdiction over appeals from dispositions of pretrial motions. The Federal Rules of Appellate Procedure are not a grant of jurisdiction over any appeal; by their express terms, they neither extend nor limit statutory jurisdiction. Fed. R. App. P., Rule 1(b). Likewise, petitioner's reliance on 28 U.S.C. 1292 is misplaced. Congress has never extended to Tax Court proceedings the exceptional provisions of 28 U.S.C. 1292(b) permitting interlocutory appeals, in the discretion of the court of appeals, from certain orders of district courts. *Ryan* v. *Commissioner*, *supra*, 517 F. 2d at 16; *Commissioner* v. *Smith Paper*, *supra*, 222 F. 2d at 128.

By dismissing the appeal, the court of appeals did not deprive petitioner of due process. Even though these "Interlocutory orders of the Tax Court are not immediately reviewable, * * * they are reviewable later

when a review is taken of the final 'decision' of the Tax Court." *Licavoli* v. *Commissioner*, *supra*, 318 F. 2d at 282. Moreover, petitioner was not prejudiced by the court of appeals' refusal to consider petitioner's supplemental memorandum. That memorandum presented arguments on the merits of the Commissioner's determination of deficiencies and did not address the jurisdictional question.

United States v. *California Eastern Line*, 348 U.S. 351 (1955), upon which petitioner relies (Pet. 14), does not conflict with the decision below. There, the Court merely defined which orders of the Tax Court under the commonly known as Renegotiation Act, Ch. 247, 56 Stat. 226, were final orders of the Tax Court for purposes of Section 7482. That decision did not alter the rule that in proceedings for the redetermination of income tax deficiencies, a "decision" of the Tax Court is a final ruling determining the amount of tax due from a taxpayer.[1]

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[1]Nor do the other cases cited by petitioner (Pet. 11) stand for the proposition that a court of appeals must determine the merits of an appeal or write an opinion in order to determine it is without jurisdiction to hear an appeal. *Ryan* v. *Commissioner*, *supra*, recognizes that the court of appeals has no jurisdiction over interlocutory orders of the Tax Court. *May* v. *Commissioner*, 553 F. 2d 1207 (9th Cir. 1977), followed the well-established rule that an order denying intervention is not appealable unless the trial court abused its discretion. *Falik* v. *United States*, 343 F. 2d 38 (2d Cir. 1965), involved appellate jurisdiction over the interlocutory order of a district court by the certification procedure of 28 U.S.C. 1292(b). Finally, *Louisville Builders Supply Co.* v. *Commissioner*, 294 F. 2d 333 (6th Cir. 1961), dealt with an attempt to seek a Tax Court order to perpetuate testimony by way of deposition. Indeed, the court observed (294 F. 2d at 336) that the decisions holding that interlocutory orders "entered by the Tax Court in the course of a plenary consideration of the assessment of a tax deficiency" to be nonappealable were distinguishable.

2. Finally, petitioner argues (Pet. 11) that the court of appeals was required to express an opinion on the application of the "collateral order" doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). Petitioner does not assert that the doctrine applies to his case or that the issues he seeks to raise on appeal are collateral to the main issue in suit and that they are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (*id.* at 546). An order denying pretrial motions is neither within that class of collateral orders nor independent of the main cause of action.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979

DOJ-1979-11